

ment, necessarily living in the Washington area, when he and his family were refused membership in a community recreational facility available to all other residents. In these circumstances, the United States, as the largest employer in the region affected, has a more immediate interest in the problem, and, also, a more obvious responsibility for attempting to offer a solution.

STATEMENT

Little Hunting Park, Inc., was incorporated as a non-stock corporation in 1954 principally for the purpose, set forth in its certificate of incorporation, of organizing and maintaining "community park and playground facilities," including a swimming pool, for "community recreation purposes" (A. 24, 120-121). Currently, swimming, tennis and other recreational activities are made available to the residents of four specified subdivisions (Bucknell Manor, Bucknell Heights, Beacon Manor and White Oaks) and certain adjacent areas in Fairfax County, Virginia (A. 28, 121, 143). Subject to a 600-share maximum, the corporation's bylaws provide that membership shares entitling the holder, his family and guests to use its facilities, are available to all adult persons who "reside in, or who own, or who have owned housing units," within the specified geographic areas (A. 28, 121-122).¹ No other qualification requirement, such

¹ The number of persons living within the four specified subdivisions who are shareholders varies from 115 out of the 750-800 families residing in the Bucknell Manor and Bacon Manor subdivisions to 136 out of the 174 families residing in Bucknell Heights. There are no statistics on White Oaks (A. 148-149, 163).

as nomination or recommendation by existing members, is mentioned. There are no limits on the number of shares an individual may hold; shares have been held by institutions and corporations owning property in the prescribed areas (A. 28, 46, 121, 123-124, 216-218). Shares may be acquired either by purchase directly from the corporation or from a previous holder (at prices ranging from \$150-\$230), or by lease from a landlord to his tenant (A. 28-29, 45-46, 122-123, 128). The bylaws provide that the issuance and assignment of shares is subject to approval of the Board of Directors of Little Hunting Park, but in the first 12 years of its operation, 1,183 shares were issued and 322 shares assigned without there being any record of any assignment having been denied approval, prior to the attempt of Sullivan to assign a share to Freeman (A. 29, 40-50, 125-128, 148).²

Petitioner Paul E. Sullivan owns two houses within the geographic areas served by the recreational facilities of Little Hunting Park. From 1962 until 1965, he held a membership share for each (A. 45-46, 78-79). During those years he rented one of the houses to various tenants, including the Little Hunting Park share for that house as part of the leasehold interest (A. 46, 49). On February 1, 1965, he leased the house to Dr. T. R. Freeman, Jr., for a term of one year, subject to renewal. He included the membership share in Little Hunting Park as part of the leasehold inter-

² There was testimony that an assignment of a share was disapproved by the Board of Directors in May 1961. Since there are no records of the incident, details of the transaction and the reason for any disapproval are not now known. (A. 127).

est to which the rental fee, \$129 per month, applied (A. 46-47, 177). Dr. Freeman and his family are Negroes. They moved into the house (and remained there into 1967), but the assignment of the Little Hunting Park share membership was not approved by the Board of Directors. It is clear from the record that they rejected it solely because Freeman is a Negro (A. 48, 51-52, 55, 112-113, 130-131, 145-146, 155-156, 188-189).

Following the Board's disapproval, Sullivan met with various members of the Board, other shareholders, and community leaders in an effort to have the decision reversed. He organized a members' petition to the Board for a membership meeting to hear Freeman and reconsider the decision to keep him out. The Board met on June 11, 1965, and decided Sullivan had given "due cause" for expulsion from the corporation by his refusal to accept the Board's decision and his allegedly intemperate criticism of the Board's action (A. 59, 130, 138-139, 190). Neither the Board nor the membership ever met with Dr. Freeman. On August 24, 1965, after giving Sullivan a brief hearing, the Board voted unanimously to expel him (A. 67, 71-72, 77, 97-98, 143, 157-158). Sullivan was notified of this action by a letter from the president of the corporation which also included a check tendering to him the then current sale price of his two shares (A. 72, 116, 200-201).

Sullivan and Freeman then commenced separate civil actions against Little Hunting Park and its directors. Both sought orders declaring the corporation's racially discriminatory admission policy invalid

and requiring it to approve Sullivan's assignment to Freeman (A. 5-13, 15-19). Sullivan also sought reinstatement of his membership shares and monetary damages for his wrongful expulsion. Freeman also prayed for monetary damages to compensate him for Little Hunting Park's unlawful interference with his contract with Sullivan and for depriving him of the full enjoyment of his leasehold estate.

The trial court, the Circuit Court of Fairfax County, Virginia, dismissed both complaints, holding Little Hunting Park to be a private social club with authority to determine the qualifications of those using its facilities, including the right to deny use on the basis of race (A. 232, 235). The court found that the expulsion of Sullivan was permitted by the relevant provisions of the corporate bylaws and justified by the evidence (A. 232).

The Virginia Supreme Court of Appeals rejected the petitions for appeal, citing plaintiffs' failure to comply with a state procedural rule (A. 242, 243). This Court vacated that judgment and remanded the case to the Virginia Supreme Court for "further consideration in light of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409" (A. 244). On remand the Virginia Supreme Court disposed of the case on the same procedural ground (A. 247-249), and petitioners once again sought review in this Court.

SUMMARY OF ARGUMENT

I. The central question in this case is whether the "property" clause of Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982, prohibits a corporate com-

munity recreational association from discriminating with respect to membership on the basis of race, where access to the facilities involved is available to all other residents in a stated geographic area. The question is largely settled by *Jones v. Mayer Co.*, 392 U.S. 409. Under that decision, it seems clear that the developer of a comprehensive community such as Reston, Virginia, or the apartment-town house complexes of Southwest Washington, D.C., would not satisfy the statute if he sold or leased living quarters to all, but permitted only whites to use the community's other facilities. Even though the corporation here was not part of a larger development plan and all houses in the neighborhood concerned were not automatically members, this case is essentially the same. Little Hunting Park is not a private social club; except for this case, membership in it has never been premised on anything other than living in the area and paying the necessary fees. There are none of the earmarks of exclusivity or choice traditionally associated with the private club; the case in this respect is just like *Daniel v. Paul*, 395 U.S. 298, decided last term. Whether viewed as an incident to real estate, or as personal property, the membership shares in Little Hunting Park are subject to the guaranties against racial discrimination embodied in Section 1982.

Neither enactment of a public accommodations law in the Civil Rights Act of 1875 nor this Court's decision in the *Civil Rights Cases*, 109 U.S. 3, stands as an obstacle to our conclusion. There can be little doubt that the draftsmen of the 1866 Act believed that they were reaching places of public accommodation. The reach

of the 1866 Act was clearly shown by its reenactment in 1870, after adoption of the Fourteenth Amendment had explicitly guaranteed to Negroes equal protection of the law. If any reason need be found why Congress again addressed itself to the subject in 1875, we think it may be found in a desire to provide a more effective means, through federal enforcement, to vindicate rights already recognized. The *Civil Rights Cases* have been substantially eroded by this Court's subsequent decisions, particularly its broad reading of the congressional power to enforce the Thirteenth Amendment in *Jones*.

Nor does the Public Accommodations Law of 1964 affect the coverage of the 1866 Act. Here, also, *Jones* principally answers any question through its rejection of a comparable argument based on the Fair Housing Title of the Civil Rights Act of 1968. The 1964 Act indicates nothing of the purpose of legislators a century earlier; there are substantial differences between the new laws and the old; and while the 1964 Act has limitations absent from that of 1866, there is no reason to treat these as a repeal *sub silentio* of the 1866 Act (see *Jones*, 392 U.S. at 437). To the contrary, the 1964 Act specifically saves prior legislation to the extent it is not inconsistent, and we show that this condition is met.

II. We discuss briefly objections raised to the standing of the white assignor of membership, Mr. Sullivan, and to the damages which both petitioners seek. Petitioner Sullivan's standing is settled by *Barrows v. Jackson*, 346 U.S. 249, where a white seller was found

to have standing to assert a Negro's rights under the Fourteenth Amendment in resisting a suit for damages which a co-covenantor claimed had been caused by the seller's breach of a racially restrictive covenant. Here, also, the injury of which Mr. Sullivan complains has been inflicted upon him as a direct consequence of his attempt to recognize a Negro's civil rights and for the purpose of punishing that attempt. While Section 1982 states no explicit method of enforcement, courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 98 (C.A. 8). No such indication has been given in this case, see 28 U.S.C. 1343(4), and the damages remedy is plainly appropriate, *Texas and Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39. Both in order to compensate the Negro for any harm done and to deter disobedience of the law, this Court should hold that the damages are recoverable under 42 U.S.C. 1982.

ARGUMENT

I

RACIAL DISCRIMINATION IN THE ASSIGNMENT OF MEMBERSHIPS IN LITTLE HUNTING PARK, INC., VIOLATES SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866

The central question in this case is whether the "property" clause of Section 1 of the Civil Rights Act of 1866, now codified as 42 U.S.C. 1982, prohibits the respondents' conduct—conduct which has effec-

tively denied to the Freemans, on account of their race, access to the community recreational facilities available to all other residents as an incident of their ownership or lease of property in the area. The matter is largely settled by *Jones v. Mayer Co.*, 392 U.S. 409, which construed the statute as reaching wholly private discrimination with respect to the sale of real estate—a ruling which necessarily applies to all transactions covered by 42 U.S.C. 1981 and 1982, since both provisions derive from a single clause of Section 1 of the Act of 1866.³ In light of *Jones*, the only *property* issue here is whether the assignment of the membership share in the Little Hunting Park is a transaction protected by that section. That is presumably an aspect

³ Section 1 of the Civil Rights Act of 1866 (14 Stat. 27) read as follows:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The "property" clause became separated when the rest of the provision, slightly expanded and made applicable to resident aliens as well, was re-enacted in *haec verba* as Section 16 of the Enforcement Act of May 31, 1870 (16 Stat. 140, 144). The property guarantee remained available to citizens alone as part of the 1866 Act, the whole of which was re-enacted (by refer-

of the question expressly left open by the Court's opinion in *Jones*. 392 U.S. at 413-414 n. 10.⁴ Because, in our view, Section 1982 clearly covers the case, we do not here invoke Section 1981.⁵ See, however, the government's brief *amicus curiae* in *Daniel v. Paul*, No. 488, O.T., 1968, pp. 9-14.

A. SECTION 1982 BARS RESPONDENT'S CONDUCT

1. *The share is an incident of real property covered by Section 1982*

We think there could be no doubt that had the membership shares in Little Hunting Park, Inc., been part of a unified development plan, as in communities such as Reston, Virginia, or the apartment-town house complexes of Southwest Washington, D.C., Section

ence only) by Section 18 of the Enforcement Act of 1870. This division was formalized in the Revised Statutes of 1878, the "property clause" being codified as Section 1978, the rest as Section 1977, and persists today in Sections 1982 and 1981 of Title 42 of the United States Code.

⁴ After pointing out that 42 U.S.C. 1982, unlike the recently enacted Fair Housing Law, "does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling" (392 U.S. at 413-414), the Court added, in the margin (n. 10):

In noting that 42 U.S.C. § 1982 differs from the Civil Rights Act of 1968 in not dealing explicitly and exhaustively with such matters * * *, we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute "property" as that term is employed in § 1982. Nor do we intimate any view upon the extent to which discrimination in the provision of such services might be barred by 42 U.S.C. § 1981 * * *.

⁵ Although petitioners did not plead either Section 1982 or Section 1981 as a ground for relief, their suits were brought before this Court's decision in *Jones*, and the Court therefore may

1982 would forbid the developer from selling or leasing quarters to whites with, and to Negroes without, access to the community's recreational facilities. The statute guarantees all citizens "the same right * * * as is enjoyed by white citizens * * * to * * * purchase, lease * * * real property." (Emphasis added.) Implicit in that guarantee is the right to the same use and enjoyment of the property and all its incidents as a white citizen would receive. As the record shows, community recreational facilities, especially swimming pools, are a major factor affecting the desirability and value of residential property. The routine exclusion of Negroes from such facilities would both discourage them from buying in that community, and make any purchase they did make a poorer bargain than that a white citizen could obtain. "Solely because of their race, non-Caucasians will be unable to purchase, own [rent] and enjoy property on the same terms as Caucasians." *Barrows v. Jackson*, 346 U.S. 249, 254. It would be inconsistent with this Court's interpretation of § 1982 in *Jones* for the statute to be interpreted as meaning that a Negro has the same right to buy or lease property as a white citizen but can be precluded from enjoying some of the incidents thereof on the basis of his race.⁶

consider issues arising under the statute, *United States v. The Schooner Peggy*, 1 Cranch 103, 110, as it recognized by its prior disposition of this case, 392 U.S. 657. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-143; *Hamm v. City of Rock Hill*, 379 U.S. 306.

⁶ Evidence that the contemporary Congress does not distinguish between discriminating in the leasing of real property and the incidents thereof may be found in the Civil Rights Act of 1968,

The legislative history cited by this Court in *Jones* makes it reasonably clear that the Congress which originally enacted § 1982 in an effort to eliminate the badges of slavery did not intend to preclude discrimination only in the actual sale or rental of the dwelling involved, allowing it to continue with reference to the incidents of ownership or possession. Thus, in his speech of January 5, 1866, Senator Trumbull said:

This measure is intended to give effect to that declaration [the Thirteenth Amendment] and secure to all persons within the United States practical freedom. *There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.*⁷

Such language negatives any attempt to read the statute narrowly. So here, there is no reason to suppose that Section 1982 makes an empty promise (see *Jones*, 392 U.S. at 443), which is satisfied if Negroes are allowed to buy or rent homes but are, in practical effect, banned from the neighborhood by being denied access to a community recreation facility which is, for white persons, a valuable incident of the possession of real property. The present case involves, at least, an obvious abridgement or dilution of the right to acquire a home, when the Negro is told: You may

Section 804(b), which makes it unlawful to "discriminate against any person in the * * * sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color * * *."

⁷ Cong. Globe, 39th Cong., 1st Sess., p. 474, quoted at 392 U.S. at 431-432; emphasis supplied.

buy or rent a house, but you may not acquire the right to use any of the community facilities which are open to your white neighbors. It seems plain that this result cannot be condoned without breaking the statutory pledge to the Negro that he shall enjoy "the same right * * * as white citizens."

Section 1982 is no less applicable here because the facilities are provided by a separate and ostensibly private membership corporation to which only some of the houses in the communities served belong, but which has as its only expressed standard for membership the geographic location of the house concerned. We cannot accept the trial court's view that Little Hunting Park is a private social club, and therefore free to discriminate on racial grounds in membership matters. Every adult owning or leasing a house in the prescribed geographic area is eligible, without further qualification, recommendation, or nomination, to become a member. Save for this instance and possibly one other—which for all the record shows may have been like it—the assignment or sale of shares from owner to tenant or purchaser has always been routinely approved; 322 such assignments were made between 1955 and 1966 (A. 125-126). Access to the pool is simply as aspect of living in the area, subject only to paying for the privilege.

The case is in this respect much like the situation this Court confronted last Term in *Daniel v. Paul*, 395 U.S. 298. The "club" involved there was a large one, serving people from miles around; visitors purchased a low-cost "membership" each season and also

paid to use certain facilities on each visit; such memberships were routinely issued to all whites who sought them, but refused to Negroes. Little Hunting Park is much smaller in size, intended for the use and enjoyment of a limited number of families in a smaller geographic area; the initial membership charge is high and yearly fees are assessed so that it may meet expenses. But the administration of its membership policies precisely tracks that which characterized *Daniel v. Paul*: subject to the availability of memberships,⁸ any white adult living in the community could join; Negroes could not.

Just as in *Daniel v. Paul*, such a policy does not justify characterization of the facility as a private club. "Membership" which may be conveyed, assigned, and held by a corporation, and which is based on geography alone,¹⁵ is the very antithesis of the private social club. Thus, the Fourth Circuit has held that an establishment's "serving or offering to serve all members of the white population within a specified geographical area is certainly inconsistent with the nature of a truly private club." *Nesmith v. YMCA of Raleigh, N.C.*, 397 F.2d 96, 102. See also *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703 (S.D.N.Y.); *United States v. Richberg*, 398 F.2d 523 (C.A. 5). The hallmarks of the private club are missing here: membership is not even personal to any individual; nor is any attempt made to achieve any sort of compatibility of background or interest, save geography. There is

⁸ In 1965, the year in question, 36 memberships were available. Memberships were available in 7 of Little Hunting Park's first 12 years (see A. 144).

thus no more occasion in this case than there was in *Daniel v. Paul* to consider whether the Civil Rights Act of 1866 applies to bona fide private clubs; our submission is only that when a privilege which for all others is incident to housing has been denied for reasons of race, the statute is brought into play.

Nor do we think the fact that not all houses in the eligible community belonged to Little Hunting Park impeaches our conclusion that the membership Dr. Freeman was denied was an incident of the real property he had leased. For individuals free to join or not as they chose, the availability of the facilities still adds value to the land which cannot be realized by persons barred from membership on racial grounds. As a matter of regular practice, shares in Little Hunting Park do run with titles to realty and with leasehold interests on houses for which membership shares are outstanding. The record shows (A. 99-108) that northern Virginia generally lacks governmentally owned and operated recreational facilities; there are only a few privately owned establishments open to the general public. The record also supports the conclusion that a community swimming pool facility is a major factor affecting the desirability and value of residential property.

Moreover, once an individual has purchased membership in Little Hunting Park, its racially discriminatory membership policy exercises considerable leverage over his future transactions involving his own home. The purchase is a considerable investment, which enhances the value of his home and which he will wish to protect. Sale of the home to a Negro, who

could not purchase the share, is distinctly less advantageous to him than sale to a white.⁹ Similarly, since the corporation prohibits assignments to anyone other than a tenant and requires annual payment of assessments to keep memberships valid whether or not they are used, rental of a home to a Negro is less advantageous than to a white willing to pay the assessment for the privilege of using the facilities. Given the absence of alternative public facilities, Negroes are discouraged from living in the community. Any Negro who does purchase or rent such a home must pay a "race tax" for the membership rights he is forbidden to use. See *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210, 215-216 (N.D. Ill.).

We conclude that the action of Little Hunting Park constitutes a violation of § 1982 relative to Dr. Freeman's right to rent real property and enjoy the use of the appurtenance privileges.

2. *The share, as personal property, is covered by Section 1982.*

In *Jones* the Court held that Section 1982 not only proscribed racial discrimination denying the Negro "the right to live wherever a white man can live," but also conduct denying the Negro "the freedom to buy whatever a white man can buy." 392 U.S. at 443. Apart from its intimate connection with real property, a Little Hunting Park share is a chattel which has an inherent value, is freely transferable among whites

⁹ Little Hunting Park's bylaws do not obligate it to repurchase membership shares except in cases of expulsion. A. 29, 125.

by sale or assignment,¹⁰ and carries with it the privilege and land benefits incident to its possession, namely membership in Little Hunting Park. As such, it has all the attributes generally associated with personal property and, we submit, should be regarded as personalty similar to a share of stock in a corporation. See *Hyde v. Woods*, 94 U.S. 523; *Page v. Edmunds*, 187 U.S. 596; *Baird v. Tyler*, 185 Va. 601, 39 S.E. 2d 642, 645-646; cf. *Travelers Health Association v. Commonwealth*, 188 Va. 877, 51 S.E. 2d 263, affirmed on other grounds, 339 U.S. 643; *Securities and Exchange Commission v. Universal Service Association*, 106 F. 2d 232 (C.A. 7); *Davenport v. United States*, 260 F. 2d 591 (C.A. 9).¹¹

¹⁰ Again, the fact that any transfer or assignment must be "approved" by the Board of Directors before it becomes effective against the corporation does not, in the circumstances here, impair the conclusion of free transferability. So far as the record shows, denial of approval is used only to preserve the racial homogeneity of Little Hunting Park. A device thus limited to what the statute forbids is clearly not to be considered as determining whether or not the statute applies.

¹¹ We do not consider dispositive the fact that under Virginia law a Little Hunting Park share is deemed a security and, as such, is regarded as personal property (Code of Virginia, § 13-105 (1950), 13.1-211 (1964)). In light of *Jones*, the federal courts will be called upon to develop a body of law as to what, for example, constitutes "property" under Section 1982 and "contracts" under Section 1981. That determination should not be made subject to the laws of the 50 State jurisdictions. *Erie R. Co. v. Tompkins*, 304 U.S. 64, notwithstanding, it is clear that regarding questions within the area of federal legislative jurisdiction, the federal courts are authorized to develop federal law, in order to assure the necessary uniformity of disposition. E.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457; *Howard v. Lyons*, 360 U.S. 593, 597. See also *United States v. Standard Oil Co.*, 332 U.S. 301, 307.

For the reasons elaborated above, Little Hunting Park's refusal to approve Sullivan's assignment to Freeman should be held to be violative of the statute. The right to purchase or lease is surely meaningless unless the statute also reached the conduct of those who have it within their power to prevent the Negro from enjoying the rights transferred. Otherwise, the Negro buys nothing. Unless one is prepared to assume that Negroes will continue to buy even when apprised that their money will purchase only a certificate and not also the rights that generally run with it, Little Hunting Park will be able to subvert the purpose and intention of the statute. Cf. *Barrows v. Jackson*, 346 U.S. 249.

B. SUBSEQUENT ENACTMENT OF A PUBLIC ACCOMMODATIONS LAW IN 1875 DOES NOT INDICATE THAT THE RIGHTS CLAIMED HERE WERE BEYOND THE SCOPE OF THE 1866 LEGISLATION

What has been said sufficiently shows that Section 1 of the Civil Rights Act of 1866, on its face, reaches the discriminatory policy of Little Hunting Park. A question arises, however, whether the right to equal enjoyment of facilities like those involved here must be deemed excepted from the coverage of the 1866 Act because that matter is governed by special laws dealing with "places of public accommodation." We confront the issue because it seems to us the facilities of Little Hunting Park do, indeed, serve the role of places of public accommodation.

The argument that the Civil Rights Act of 1866 does not embrace places of public accommodation

would focus initially on the Civil Rights Act of 1875¹² (18 Stat. 335) held unconstitutional in the *Civil Rights Cases*, 109 U.S. 3. The suggestion would be that this roughly contemporaneous statute must be looked to as exclusively regulating this subject.

1. At the outset, we stress that there can be little doubt that the draftsmen of the 1866 Act believed they were reaching places of public accommodation. The 39th Congress, which passed the First Civil Rights Act and framed the Fourteenth Amendment, legislated against a background of common law rules affording members of the public not suffering from racial disability a legal right to use public conveyances and to obtain service in inns and hotels. See, e.g., Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 149-153; *Civil Rights Cases*, 109 U.S. 3, 37-43 (Harlan J., dissenting); *Bell v. Maryland*, 378 U.S. 226, 295-299 (Goldberg, J., concurring). Accordingly, it may be supposed that the declaration of citizenship and of the right to purchase property and to make and enforce contracts in Section 1 of the 1866 Act was meant, at the least, to confer on Negroes the "same right" to the services of public accommodations as white citizens had enjoyed. Compare

¹² In speaking of the Civil Rights Act of 1875 we refer to Sections 1 and 2, which dealt exclusively with places of public accommodation. Section 4 of the Act, outlawing racial discrimination in jury selection, was vindicated in *Ex Parte Virginia*, 100 U.S. 339, and is today codified as 18 U.S.C. 243. Sections 3 and 5 were jurisdictional provisions, presumably applicable to the whole of the Act.

Ferguson v. Gies, 82 Mich. 358, 365; *Donnell v. State*, 48 Miss. 661. Indeed, opponents of the Freedmen's Bureau bill and the Civil Rights Act argued, without contradiction, that those measures would afford Negroes the right to equal treatment in places of public accommodation. See Cong. Globe, 39th Cong., 1st Sess., 541, 936; *id.* App. 70, 183 (Representatives Dawson and Rousseau, Senator Davis); *Jones v. Mayer Co.*, *supra*, 392 U.S. at 433, 435 n. 68. Presumably, the proponents of the Act offered no denial because they recognized that this was, indeed, one inevitable consequence of granting Negroes equality before the law, even in the narrowest sense. See *Coger v. North West Union Packet Co.*, 37 Iowa 145 (1873); Flack, *The Adoption of the Fourteenth Amendment* 11-54 (1908). See also Supplemental Brief for the United States as *Amicus Curiae*, Nos. 6, 9, 10, 12, and 60, O.T. 1963, pp. 119-130.

This reach of the 1866 Act was made clearer by the re-enactment of the measure in 1870, after the adoption of the Fourteenth Amendment, which had confirmed the grant of citizenship to Negroes and explicitly guaranteed "equal protection of the laws." See *Jones v. Mayer Co.*, *supra*, 392 U.S. at 436-437. That understanding is reflected in the protracted congressional debates on the proposals which culminated in the Civil Rights Act of 1875, debates premised on the same concept of "civil" rights which underlay the declaration of rights in the 1866 Act. See Cong. Globe, 42d Cong., 2d Sess., pp. 381-383 (Senator Sumner); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323-1336. There was, in-

deed, specific reference to an existing duty to afford Negroes equal treatment in places of public accommodation. As the Chairman of the House Judiciary Committee, Representative Butler of Massachusetts told his colleagues, the bill which ultimately was enacted as the Civil Rights Act of 1875¹³—

* * * gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what * * * every man * * * has by the common law and civil law of the country.

2. The question remains: If freedom from racial discrimination in places of public accommodation was already a federal right—secured by the Civil Rights Act of 1866, re-enacted in 1870—why then did Congress address itself to the subject again in 1875?

We might simply offer the short answer given for the Court by Mr. Justice Holmes in *United States v. Mosley*, 238 U.S. 383, 387, rejecting the argument that 18 U.S.C. 241 should not be read as reaching interference with voting rights because they were specifically dealt with elsewhere: "Any overlapping that there may have been well might have escaped attention, or if noticed have been approved." Redundancy is not rare in legislation of the period. See, *e.g.*, the overlap of Sections 241 and 242 of the Criminal Code as applied to rights protected by the Fourteenth Amendment, noticed in *United States v. Williams*, 341 U.S. 70, 78 (opinion of Frankfurter, J.), 88 n. 2 (opinion of Douglas, J.), and condoned in *United*

¹³ 2 Cong. Rec. 340.

States v. Price, 383 U.S. 787, 800-806, 802 n. 11. This may be no more than another instance of duplication. But there is another explanation for the Civil Rights of 1875.

It is most likely, we think, that the 1875 law was enacted not to afford a new guarantee of equality in public accommodations, but to provide a more effective means, through federal enforcement, of vindicating rights which already had been recognized. The 1866 law provided no specific civil remedy for violation of the rights enumerated in Section 1, and its criminal provisions were applicable only to conduct done "under color of law." See Section 2 of the Act, now 18 U.S.C. 242. Negroes who were denied equal treatment in places of public accommodation were thus forced to seek redress under State law or through the uncertain remedies which might be available in the federal courts. See *Jones v. Mayer Co.*, *supra*, 392 U.S. at 414 n. 13. The debates on the 1875 law demonstrated an awareness of the need for more effective enforcement of the right: "the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every innkeeper who, or railroad company which, insults him by unjust discrimination" (2 Cong. Rec. 4082 (Senator Pratt)).

The congressional response to this problem was the dramatically enlarged federal role assumed by Section 2 of the 1875 Act. Although earlier laws had confined criminal penalties for interference with civil rights (other than voting) to official conduct or con-

spiracies, Section 2 made it a federal offense (a misdemeanor) for *any* person, even acting privately and alone, to deny equal treatment in public accommodations. And Section 3 directed federal officials to initiate prosecutions under the Act. Section 2 also provided for a fixed penalty of \$500 which the aggrieved person could recover from the violator in a civil action exclusively in a federal court. In short, the apparent purpose and effect of the Civil Rights Act of 1875 was to focus particularly on one of the many rights secured by the 1866 Act which was appropriate for especially stringent federal enforcement. That is, of course, a fully adequate basis for the enactment of supplementary legislation.

C. THIS COURT'S DECISION IN THE *CIVIL RIGHTS CASES* IS NOT A
VIALE OBSTACLE TO OUR CONCLUSION

A question remains whether the decision in the *Civil Rights Cases*, 109 U.S. 3, does not foreclose our conclusion that the Civil Rights Act of 1866 outlaws racial discrimination in places of public accommodations. There are two possible difficulties: the first premised on the holding that the Act of 1875 was unconstitutional; the second on the distinction drawn in the opinion between the 1875 Act and the Civil Rights Act of 1866.

1. Insofar as the *Civil Rights Cases* denied the power of Congress under the Thirteenth and Fourteenth Amendments to reach racial discrimination in privately owned places of public accommodation, we think it plain that the authority of that ruling has been eroded by later decisions. The underlying premise

of the Fourteenth Amendment holding in the *Civil Rights Cases*—that legislation enforcing the Equal Protection Clause can only reach discriminatory conduct by persons invoking the shield of State law—was rejected by a majority of the Court in *United States v. Guest*, 383 U.S. 745, 762 (Clark, J., concurring), 781–784 (opinion of Brennan, J.). But, for present purposes, it is enough to notice that the narrow view taken in the *Civil Rights Cases* with respect to congressional power under the Thirteenth Amendment is inconsistent with *Jones v. Mayer Co.*, *supra*.

We recognize that the Court in *Jones* did not, in terms, overrule the Thirteenth Amendment holding of the *Civil Rights Cases*; there being no occasion to confront the ruling directly. See 392 U.S. at 441 n. 78. But the Court did expressly hold that Section 2 of the Thirteenth Amendment authorizes legislation which does more than merely restore legal capacity to former slaves. Thus, it was stated that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation” (392 U.S. at 440). Accordingly, the Court expressly overruled *Hodges v. United States*, 203 U.S. 1, a decision holding—on the authority of the *Civil Rights Cases*—that Section 1981 could not validly bar racial discrimination affecting a contract of employment (392 U.S. at 441–443 n. 78). And, in language fully applicable here, the Court broadly held (392 U.S. at 443):

Negro citizens North and South, who saw in the Thirteenth Amendment a promise of free-

dom—freedom to “go and come at pleasure” and to “buy and sell when they please”—would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. * * * [Notes omitted.]

The thrust of the *Jones* opinion, we submit, is that it is *not* “running the slavery argument into the ground”—as the majority in the *Civil Rights Cases* supposed (109 U.S. at 24)—to concede congressional power to attempt to eradicate the vestiges of the slave system wherever they persist in the public life of the community. Whatever the validity in 1883 of viewing admission to places of public accommodations as a mere matter of “social rights” (109 U.S. at 22) and characterizing the discriminatory exclusion by the proprietor as involving only a discretionary decision “as to the guests he will entertain” (109 U.S. at 24), that approach does not conform to the present reality. Cf. the opinion of Mr. Justice Douglas, concurring, in *Bell v. Maryland*, 378 U.S. 226, 245–246, 252–283. In light of the old common law obligation, imposed on at least some operators of public accommodations, it is difficult to appreciate that the privilege of obtaining entry and service without arbitrary discrimination was ever a mere “social” matter. But, at all events, it is today more properly deemed a “civil

right." Cf. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 251. In sum, we believe the constitutional power of Congress under the Thirteenth Amendment to reach racial discrimination in modern places of public accommodations is no longer open to doubt.

2. We have already elaborated our view that the Congress of 1866 meant to outlaw the kind of discrimination revealed by this record. Even assuming the constitutionality of such an effort, however, the *Civil Rights Cases* may be invoked as apparently reaching the opposite conclusion, as a matter of statutory construction.

The objection, once again, is largely answered by the decision in *Jones v. Mayer Co.* Insofar as the prevailing opinion in the *Civil Rights Cases* characterizes the Civil Rights Act of 1866—in contrast to the Act of 1875—as merely removing legal “disabilities” (see 109 U.S. at 22), without in any way controlling the freedom of sellers to discriminate on racial grounds, that view has been squarely rejected by the Court. *E.g.*, 392 U.S. at 418–419, 436. We add only that, assuming the 1866 Act can properly be read as impliedly exempting certain personal transactions, and assuming further there was once a basis for considering a right of access to a place of recreation as outside the scope of the Act, present circumstances would now justify treating such a transaction as covered.

**D. THE PUBLIC ACCOMMODATIONS LAW OF 1964 DOES NOT AFFECT
THE COVERAGE OF THE 1866 ACT**

One final objection suggest itself: that enactment in 1964 of a Public Accommodations Law as Title II

of the Civil Rights Act of that year (42 U.S.C. 2000a *et seq.*), in some way supersedes the provisions of the 1866 Act insofar as they deal with the same subject matter. Here, too, *Jones v. Mayer Co.* indicates the answer by rejecting a comparable argument premised on an interpretation of the Fair Housing Title of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) as repealing or qualifying the "property" provision of the 1866 statute.

1. Of course, the understanding of the legislators of 1964 as to the intent of their predecessors a century earlier is only very remotely relevant. Certainly, it cannot override the clear indications given in 1866 and in 1875 that the original Civil Rights Act reached places of public accommodations. Accordingly, just as the Court did not look to the drafters of the Fair Housing Law of 1968 to determine the scope of the 1866 Act with reference to the issues before it in *Jones*, here the Court's construction of the Act should not be affected by the views prevailing in the 88th Congress. Nor is it even important to know what those views were: whether one assumes that the Act's full scope was or was not appreciated in 1964, it is clear that Title II of the Civil Rights Act of that year was not intended to repeal or supersede or amend the old statute.

2. We note first—as the Court did in *Jones* (392 U.S. at 413-417)—that there are substantial differences between the new laws and the old. For example, Title II of the 1964 Act prohibits discrimination on the basis of "race, color, religion, or national origin"

(Section 201(a)), while the 1866 Act presumably applies only to race or color discrimination. Although the 1866 Act, on its face, prohibits all racially motivated denials of the rights it protects, Title II applies only to certain types of establishments having some nexus with interstate commerce (Sections 201(b), 201(c)). The 1866 Act is couched in declaratory terms, without reference to any particular mode of enforcement, whereas Title II embodies a specific remedy provision (Section 204(a)). Significantly, the new law—unlike the old—expressly provides for enforcement at the instance of the Attorney General (Section 206), and the 1964 Act also created a Community Relations Service to assist in the private settlement of disputes relating to discriminatory practices (Title X, Sections 1001-1004, 42 U.S.C. 2000g-2000g-3) to which the courts may refer cases brought under Title II for the purpose of achieving voluntary compliance (Section 204(d)).

In many respects the differences are comparable to those between the 1866 Act and the 1968 housing law which the Court noticed in *Jones*. Here, too, the old law is "a general statute applicable only to racial discrimination * * * and enforceable only by private parties acting on their own initiative," while the new legislation is a "detailed" and specialized enactment "enforceable by a complete arsenal of federal authority" (392 U.S. at 417). Accordingly, if we assume that the Congress of 1964 recognized the vitality and applicability of the Civil Rights Act of 1866—an assumption apparently indulged by the Court in *Jones* with respect to the drafters of the

1968 housing law—Title II can properly be viewed as special supplementary legislation, replacing the nullified Act of 1875, but leaving the 1866 Act untouched.

3. It may be objected that our conclusion is sound only insofar as it focuses on those provisions of Title II which *add* substantive guarantees or remedial machinery and ignores the fact that the new law in some respects *retrenches* on the broad coverage of the 1866 Act. The answer is that, confronted with the same situation with respect to the 1968 housing law, the Court in *Jones* did not on that account find a *pro tanto* repeal; the same result is compelled here.

There are of course many possible explanations for the limitations of the 1964 Act. Some were merely responsive to the Commerce Clause approach of the legislation and then prevailing constitutional doubts concerning the scope of congressional power under the Thirteenth and Fourteenth Amendments. Most likely, the full reach of the 1866 Act in this area was not then appreciated.¹⁴ But it does not follow that the Act repealed *sub silentio*. On the contrary, Title II expressly preserves pre-existing rights under Federal law and that provision must of course be honored whether or not it was then recognized that

¹⁴42 U.S.C. 1981 and 1982 were briefly noted in the hearings on the Civil Rights Act as at least prohibiting State-sanctioned discrimination in places of public accommodation (Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., p. 134 (Senator Prouty and Attorney General Kennedy)). It does not appear, however, that Congress understood those infrequently-used statutes to have the reach which has been confirmed by this Court's construction in *Jones*.

the 1866 Act was operative with respect to public accommodations. Cf. *Jones v. Mayer, supra*, 392 U.S. at 437.

4. The savings clause is as follows (Section 207(b) of the Act, 42 U.S.C. 2000a-6(b)):

* * * [N]othing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

It will be noticed that only rights under laws "not inconsistent" with Title II remain enforceable. That is no obstacle here, however. To the extent that the 1866 Act prohibits racial discrimination by establishments which are not covered by Title II, it is not "inconsistent" with the 1964 Act in the ordinary sense that it contradicts the basic purpose of the new law; it obviously is designed to vindicate the same right. Moreover, the reference to State statutes and local ordinances makes it clear that a law with a more generous coverage was not "inconsistent" in the sense used here. For it goes without saying that Congress did not intend to invalidate State provisions which reach places of public accommodation left unregulated by the new federal law. It would be turning the statute on its head to read into it a purpose to confer on owners of non-covered establishments a federal right to practice racial discrimination, notwithstanding local legislation prohibiting it.

The conclusion that the Civil Rights Act of 1866, which implements the Thirteenth Amendment, was repealed insofar as it applies to establishments not covered under Title II can rest only on the premise that Congress deliberately determined in 1964 that the Commerce Clause was to be the exclusive basis for *all* federal regulation in respect to racial discrimination in public accommodations. There is no evidence of any such determination. Cf. *United States v. Johnson*, 390 U.S. 563, 566-567.¹⁵ Nor is there any other indication that Congress meant to repeal the Civil Rights Act of 1866 in this respect. The result is that the 1866 Act stands unimpaired.

II

PETITIONER SULLIVAN HAS STANDING TO SEEK RELIEF UNDER THE STATUTE IN CONSEQUENCE OF THE INJURIES HE SUFFERED IN OBEYING IT

We submit that petitioner Sullivan's standing to maintain this action is governed by *Barrows v. Jackson*, 346 U.S. 249. In that case a white seller of real estate was sued by co-covenantors under a racially restrictive covenant for damages they alleged to have been caused by her breach of the covenant through sale to a Negro. She attacked the resulting damage judgment against her as state action enforcing the restrictive covenant, and, therefore, denying equal

¹⁵ We note that our interpretation of Section 207(b), since it relates to the enforcement by *individuals* of rights not specifically provided by Title II, is also fully consistent with the position taken in the dissenting opinion in *United States v. Johnson*, see 390 U.S. at 568 n. 1.

protection of the laws to Negroes in violation of the Fourteenth Amendment. This Court was required to decide, *inter alia*, whether the seller had standing to assert that claim, since the right apparently ran only to a third party, the Negro purchaser. The holding was that she did. The Court found the direct pocket-book injury to her, and the necessary effect of an award of damages in giving vitality to the restrictive covenant through the agency of the state, together sufficient to support her claim of another's right.

Petitioner Sullivan's right to rely on the statute in this case is *a fortiori*. The statute involved is not limited in terms to apply to non-white citizens, nor does it confer protection solely on the person directly discriminated against. This Court has acted under it to strike down a zoning ordinance on the ground, *inter alia*, that it offended "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color." *Buchanan v. Warley*, 245 U.S. 60, 81. Here, as the Court emphasized was not the case in *Barrows*, the private action involved in refusing to honor the assignment was itself illegal. To discourage such activity, relief should be available to all persons injured by it, or as a consequence of their efforts to resist it. A contrary holding would put an unfair burden on the white man who seeks to deal with the Negro in conformity to the statutory command, and ultimately impede Negroes' ability to enforce their rights in the marketplace.

III

PETITIONERS ARE ENTITLED TO COMPENSATORY DAMAGES
AS RELIEF UNDER SECTION 1982

The provisions of Section 1 of the Civil Rights Act of 1866 are couched in declaratory terms, stating no explicit method of enforcement. To the extent injunctive relief on the complaints is still appropriate, *Jones* makes clear that it is within the authority of a federal court to grant it, 392 U.S. at 414 n. 13; since that is an established federal remedy, it is available in any state court where protection of the federal right is sought, if that court is empowered to grant injunctive relief generally. See Code of Virginia § 8-610 (1957). Petitioner Freeman, however, limited his request for injunctive relief to his own particular circumstances (A. 18-19). Since he is no longer possessed of the premises, that request now appears to be moot. It is thus necessary for the Court to reach a second question which it put aside in *Jones*, whether compensatory damages may be had for violation of the rights guaranteed by the Act.¹⁶ 392 U.S. at 414-415 n. 14.

We think it plain that compensatory damages are available. As a general rule, federal district courts have jurisdiction over any action to "recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil

¹⁶ Here, as in *Jones*, any question of punitive damages under the statute is foreclosed; the action complained of predated by several years the interpretation of the statute announced in *Jones*.

rights," 28 U.S.C. 1343(4). While this jurisdictional provision does not create a damage remedy, it indicates that Congress anticipated such awards would be made under the civil rights acts generally. Further, courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 98 (C.A. 8); *Bell v. Hood*, 327 U.S. 678, 684; see also *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U.S. 548, 569-570; *Porter v. Warner Co.*, 328 U.S. 395, 398; *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-292; *State of Alabama v. United States*, 304 F.2d 583, 590-591 (C.A. 5), affirmed, 371 U.S. 37; *J. I. Case Co. v. Borak*, 377 U.S. 426, 433. Were the judicial responsibility viewed otherwise, the courts would "impute to Congress a futility inconsistent with the great design of this legislation." *United States v. Republic Steel Corp.*, 362 U.S. 482, 492.

In a word, the existence of the statutory right implies the existence of all necessary remedies. *Texas & N.O.R. Co. v. Ry. Clerks*, *supra*, 281 U.S. at 569-570. Thus, if a statute proscribes specified acts and those acts are nonetheless committed, this Court's decisions support the view that the party injured shall have available all recognized avenues of relief in order that he be made whole. As this Court explained in *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39:

A disregard of the command of the statute is a wrongful act, and where it results in dam-

age to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law * * *, in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."¹⁷

And see 42 U.S.C. 1988.

Both for purposes of realistically compensating the Negro for any harm done, and for purposes of deterring disobedience of the law, this Court should hold that damages are recoverable. We suggest that while the rules governing damage awards under these provisions must be federal rules, not dependent upon the laws of the various states, see n. 11 *supra*, p. 19, the matter should be left for initial resolution to the trial court. That court should, however, be instructed to consider the matter within the proper context, *i.e.*, within the context of the overall statutory purpose, and with an eye to fully vindicating the federally protected rights without reference to the limitations or peculiarities of Virginia law.

¹⁷ In *Rigsby* the Court held that injury suffered as the result of the violation of a criminal statute could be redressed in civil, injunctive proceedings. Accord, *J. I. Case Co. v. Borak*, *supra*. See also *Wyandotte Co. v. United States*, 389 U.S. 191, 202. Similarly, the Court has held that when a statute provides that damage awards to injured parties will be available for violation of the law, the right of such persons to seek equitable, injunctive relief is implied. *Deckert v. Independence Shares Corp.*, 311 U.S. 282.

CONCLUSION

For the foregoing reasons, we urge that the judgment be reversed and the case remanded to the state courts for the entry of an order granting appropriate relief. ~~the case remanded to the appropriate court for the~~

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
PETER L. STRAUSS,
JOSEPH J. CONNOLLY,
Assistants to the Solicitor General.

GARY J. GREENBERG,
Attorney.

SEPTEMBER 1969.